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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANK THOMAS, JR.,

Defendant and Appellant.

E047564

(Super.Ct.No. RIF145464)

OPINION

APPEAL from the Superior Court of Riverside County. Sharon J. Waters, Judge.

Affirmed in part; reversed in part.

John L. Staley, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Susan Miller and Teresa Torreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Frank Thomas, Jr., of causing bodily injury while driving under the influence (count 1; Veh. Code, § 23153, subd. (a)) and

causing bodily injury while having 0.08 percent or more alcohol in his blood (count 2; Veh. Code, § 23153, subd. (b)). As to count 1, the jury found true three allegations that defendant personally inflicted great bodily injury upon a victim (Pen. Code, § 12022.7, subd. (a))<sup>1</sup> and a single allegation that defendant proximately caused bodily injury to four victims (Veh. Code, § 23558). Defendant contends that the trial court erred in imposing three consecutive three-year terms for the great bodily injury enhancement. We uphold the imposition of the three-year enhancements but reverse with instructions to fully pronounce judgment.

### **BACKGROUND**

The trial court set count 1 as the principal term and imposed the midterm of two years. The court also imposed three-year consecutive terms for each of the three Penal Code section 12022.7 enhancements and an additional consecutive one-year term pursuant to Vehicle Code section 23558. The court stayed the sentence for count 2 pursuant to Penal Code section 654. The trial court did not orally pronounce that it was striking any enhancements. The sentencing minute order states that enhancements were stricken.

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<sup>1</sup> Multiple enhancements pursuant to this section may be imposed for a single offense as long as no more than one such enhancement is imposed as to each victim. (See Pen. Code, § 12022.7, subds. (a), (h); *People v. Ausbie* (2004) 123 Cal.App.4th 855, 864.)

## DISCUSSION

### A. *Injury Enhancements*

Defendant contends that Vehicle Code section 23558 controls over Penal Code section 12022.7. Thus, according to defendant, the three consecutive three-year Penal Code section 12022.7 enhancements should not have been imposed. Alternatively, defendant contends, two of the three Penal Code section 12022.7 enhancements should be reduced to one-year enhancements due to a purported intent of the Legislature to only impose additional one-year terms for each additional person when multiple individuals are injured in a single motor vehicle accident. Defendant acknowledges that precedent from both of the other divisions within our district has rejected this preemption argument.

In *People v. Arndt* (1999) 76 Cal.App.4th 387, 392–394 (*Arndt*), Division Three of this district held that former Vehicle Code section 23182<sup>2</sup> did not preempt Penal Code section 12022.7. In *People v. Weaver* (2007) 149 Cal App.4th 1301, 1326–1329 (*Weaver*), Division One of this district held that Vehicle Code section 23558 was not preempted by section 12022.7. Defendant contends these cases were not well reasoned and should be disregarded.

Defendant first argues that vehicle collisions involving alcohol, which result in bodily injury, “will most likely result in great bodily injury being inflicted.” However, defendant’s own case provides an example justifying the distinction of the language in

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<sup>2</sup> Since recodified as Vehicle Code section 23558. (Stats. 1998, ch. 118, §§ 45, 84.)

the two enhancement provisions: the jury found defendant had caused bodily injury to four victims, but only inflicted great bodily injury upon three of the four victims.

Defendant next argues that the language in Vehicle Code section 23558, that the enhancement shall be imposed “notwithstanding subdivision (g) of Section 1170.1 of the Penal Code,” means that the Legislature was expressly avoiding the rule that only the greatest enhancement must be imposed when two enhancements apply and thus only Vehicle Code section 23558 should apply. However, the purpose of Vehicle Code section 23558 “is to increase the potential punishment available in certain cases where an alcohol or drug-impaired individual operating a vehicle or watercraft causes an accident which results in multiple injuries, not to limit the use of another otherwise applicable enhancement.” (*Arndt, supra*, 76 Cal.App.4th at p. 394 [explaining legislative history of then Veh. Code, § 23182].) Thus, the exclusion from subdivision (g) of Penal Code section 1170.1 was to ensure that Vehicle Code section 23558 and another enhancement could *both* apply and not to ensure that only the Vehicle Code section 23558 enhancement applied. Again, defendant’s infliction of *great bodily injury* on three victims and just *bodily injury* on a fourth victim is a good example of why two enhancements should apply to the same incident.

Finally, defendant argues that even if Vehicle Code section 23558 does not preempt Penal Code section 12022.7, only the Vehicle Code section 23558 enhancement should apply for each victim beyond the first who receives great bodily injury. Defendant bases this argument on the reference to multiple victims in Vehicle Code section 23558 but not in Penal Code section 12022.7, and because the resulting

one-year enhancement terms would parallel the one-third rule used for multiple felony convictions to be served consecutively. However, the Legislature specified in Penal Code section 12022.7 the length of the enhancement term, and defendant has provided no authority mandating a reduction in the enhancement terms specified by the Legislature.

Accordingly, we decline defendant's invitation to reject *Arndt* and *Weaver*, and we uphold the trial court's imposition of three Penal Code section 12022.7 enhancements.

#### B. *Enhancement Sentencing*

Because the jury found that defendant proximately caused bodily injury to four victims, Vehicle Code section 23558 requires three one-year enhancements. These enhancements may be stricken if the court "determines that there are circumstances in mitigation of the additional punishment and states on the record its reasons for striking the additional punishment." (Veh. Code, § 23558.) While the trial court did not impose two of the one-year enhancements and the sentencing minute order states that enhancements were stricken, the trial court did not orally pronounce the striking of any enhancements and did not state any reasons for striking the additional punishment.

"Where there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls." (*People v. Zackery* (2007) 147 Cal.App.4th 380, 385.) "The clerk cannot supplement the judgment the court actually pronounced by adding a provision to the minute order and the abstract of judgment." (*Id.* at pp. 387-388.)

Accordingly, the trial court must conduct another sentencing hearing in order to orally impose the additional enhancements, impose and stay the enhancements pursuant to Penal Code section 654's prohibition on multiple punishments, or strike the additional enhancements and state on the record its reasons for so doing.

**DISPOSITION**

The imposed sentence is reversed. The trial court is directed to conduct a new sentencing hearing. In all other respects, the judgment is affirmed.

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RAMIREZ  
P. J.

We concur:

McKINSTER  
J.

KING  
J.